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No. 89-1262

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 660,

Petitioner,

v.

EDWARD C. HESTER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent Edward Hester concedes that the court of appeals continued to apply *federal* law to determine the timeliness of respondent's claim in this case, even after this union discipline case was remanded to the lower court by this Court for reconsideration in light of the decision in *Reed v. United Transportation Union*, —— U.S. ——, 57 L.W. 4088 (January 11, 1989) (holding that borrowed state statutes of limitations and not a uniform federal limitations period govern such cases).

Respondent attempts to reconcile the decision below with *Reed* by contending that the court of appeals merely "decided that accrual of Respondent's federal claims . . . was to be determined under federal law." Resp. Br. at 6. Significantly, respondent does not cite to—let alone quote a single word from—the opinion below. Instead, respondent baldly asserts—without any support whatsoever—that the court of appeals held that his claim against petitioner Local 660 alleging a violation of § 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 411(a)(5) ("LMRDA") "accrued and the statute of limitations began to run when the International Union . . . affirmed a reduced fine" rather then "on the date [the local] served the disciplinary charge on Hester." Resp. Br. at 4-5. Respondent's version of the decision below does not constitute even a plausible reading of that decision.

Thus, respondent's defense of the decision below—and its response to our showing in the *certiori* petition that the court of appeals did not comply with this Court's remand instructions to reconsider this case in light of *Reed*—is completely without substance.

1. At the threshold, it is important to note that for more than two decades, ever since this Court's decision in *NLRB v. Marine Workers*, 391 U.S. 418 (1968), it has been settled that claims under the LMRDA accrue at the time the alleged wrong is committed, and that would-be-claimants are *not* required to invoke a union's internal appeals processes before suing over the alleged LMRDA violations. *Marine Workers* permits district courts "in their discretion [to] stay their hands . . . while the aggrieved person seeks relief within the union," 391 U.S. at 426, but *Marine Workers* does *not* authorize a court to dismiss an LMRDA claim as premature if the claimant goes directly to federal court without seeking relief within the union, *id.* at 426-428.

Thus if, as respondent now claims, the court of appeals had held that Hester's claim against Local 660 did not

accrue until *after* Hester had appealed the Local's action to the International—and thus that a suit prior to the conclusion of that appeal would have been premature—the decision below would be in square conflict with *Marine Workers*.

2. In fact, however, the court of appeals decided no such thing. In its decision on remand, that court merely stated, without explanation, that "[w]e adhere to our prior view that we should apply the rule of *Proudfoot v. Seafarers International Union*, 773 F.2d 1558 (11th Cir. 1986)." Pet. App. 4a. And the court of appeals' first opinion—the opinion to which that court "adhere[d]" on remand—makes unmistakably clear that the court below did not intend to preclude LMRDA causes of action from accruing until after the internal appeals procedure is exhausted, but rather intended to *toll* the statute of limitations during the exhaustion process.

To begin with, in its decision on the first appeal the court of appeals expressly acknowledged, citing, *inter alia*, *Marine Workers*, that under the LMRDA a union member is *not* "required . . . to pursue union grievance proceedings prior to seeking to vindicate LMRDA rights in court." Pet. App. 24a & n.24. Thus, that decision cannot possibly be read to hold that Hester's claim accrued after the conclusion of the union appeals process and would have been premature had it been filed prior to the conclusion of that process.

Indeed, in the first opinion, the court of appeals posed the question before it as whether "a union member's claim *might be tolled* during the time he or she continues to seek relief through grievance procedures." Pet. App. 19a (emphasis added). The court below then reviewed the Eleventh Circuit precedents bearing on this issue, noting that (i) in *Erkins v. Unitel Steelworkers*, 723 F.2d 837 (1th Cir. 1984), *cert. denied*, 467 U.S. 1243, "no *tolling issue* was presented," Pet. App. 20a (em-

phasis added); (ii) *Davis v. UAW*, 765 F.2d 1510 (11th Cir. 1985), *cert. denied*, 475 U.S. 1057 (1986) had suggested without deciding that "'*the limitations period might be tolled during the time a union member is exhausting his union remedies*,'" Pet. App. 21a (emphasis in original); and (iii) *Proudfoot v. Seafarers International Union*, *supra*, had "adopted the . . . solution[] proposed by *Davis*." Pet. App. 22a.

After framing the issue and relevant precedents in these terms, the court of appeals "conclude[d] that the rule announced in *Proudfoot*"—*viz.*, that the limitations period is "tolled during the time a union member is exhausting his union remedies"—controls this case." Pet. App. 23a. That court added:

> Irrespective of whether a union member may be *required* by the union or by the courts to pursue union grievance proceedings prior to seeking to vindicate LMRDA rights in court, applying the *Proudfoot* rule in this context is consistent with federal labor policy. [Pet. App. 23a-24a]

3. There can be no doubt, then, that in its initial decision in this case the court of appeals decided, as a matter of federal law, that the statute of limitations for LMRDA claims is *tolled* while a union member exhausts internal union remedies. In accord with this Court's *Marine Workers* decision the court below proceeded on the premise that Hester's LMRDA cause of action *accrued* when the allegedly defective union charges were filed against him and ruled that the limitations period on that cause was *tolled* while respondent pursued his internal union appeals. Even respondent concedes that, after *Reed*, "state law applie[s] to tolling." Resp. Br. at 11-12. Thus, by "adher[ing]" to its prior view when this case was remanded to it after *Reed*, the court of appeals failed to discharge its responsibility under the remand and rendered a decision which conflicts with *Reed* and should not be allowed to stand.

CONCLUSION

For the foregoing reasons, and those stated in our petition, the petition for a writ of certiorari should be granted and the decision below should be vacated and remanded for further consideration in light of *Reed v. Transportation Union.*

Respectfully submitted,

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